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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD. d/b/a KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, THE EUROPEAN SHIPPERS' COUNCIL, AND THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Founded in 1907, the National Industrial Transportation League ("NITL" or "League") is one of the oldest and largest

[1] Pursuant to Rule 37.6 of this Court, NITL, ESC, and APSA certify that this brief was authorized only by their counsel identified on the cover page hereof and no other person or party authored this brief in whole or in part. Furthermore, no person or entity other than the *amici* identified herein, or their members, has made a monetary contribution with respect to the preparation or submission of this brief.

national associations in the United States. It represents more than 600 companies engaged in the transportation of goods in domestic and international commerce. For many years, NITL's membership was open only to shippers and receivers of goods. However, the League recently broadened its membership to permit carriers and all other persons engaged and interested in the transportation of goods to become members. NITL's membership now includes not only shippers and receivers of goods, but also carriers, transportation intermediaries, logistics companies, and similar entities. The majority of League members, however, continue to be traditional shippers and receivers. The League's shipper members use all of the modes of carriage—motor, rail, vessel, and air—to ship commodities of all kinds across the nation and around the world.

Since its founding, NITL has supported government policies that promote competitive, efficient, and safe transportation systems both in the United States and around the world. Toward that end, the League has participated actively in federal regulatory proceedings and legislative matters dealing with national and international transportation, as well as before international organizations concerned with transportation, such as the Maritime Transportation Committee of the Organization for Economic Cooperation and Development, the Comité Maritime International, and the International Chamber of Commerce. In addition, the League was involved in passage of the key statutes referred to by the parties in this case, including the Carriage of Goods by Sea Act, Ch. 229, 49 Stat 1207 (1936) ("COGSA"), codified at 46 U.S.C. App. § 1300 *et seq*., and the Shipping Act of 1984, P.L. 98-237, 98 Stat. 67, and the amendments to that law adopted in the Ocean Shipping Reform Act of 1998, P.L. 105–258, 112 Stat. 1902, 46 U.S.C. App. §§ 1701–1719 (hereafter the "Shipping Act").

INTEREST OF THE EUROPEAN SHIPPERS' COUNCIL

Founded in 1963, the European Shippers' Council ("ESC") represents the interests of companies trading in Europe as users of freight transport services. Members are drawn from 11 national transport user organizations and national shippers' councils. The organization represents the vast majority of goods distributed by sea, road, rail, inland waterways, and air. ESC acts as the "eyes and ears" for its member organizations in respect of EU legislative activity. Equally, it functions as the "voice" of shippers in Brussels. It has the dual role of gathering and feeding back vital intelligence on current and future EU policy developments and representing its positions vis-à-vis the European institutions (European Commission, Parliament and Council).

Since its founding, ESC's prime objective has been to promote efficient and competitive freight transport services to enhance the competitiveness of companies conducting business in and beyond Europe. In this respect, ESC has two core purposes: first, to encourage and persuade transport policy makers to develop open and competitive transport markets that enhance industrial competitiveness and efficiency; and second, to promote industry best practices to encourage efficiency and improvements in transport supply chains. In addition, ESC has, over the years, been involved in discussions on the need to develop a new international maritime cargo liability treaty reflecting modern shipping practices and standards, and ESC has supported the work of UNCITRAL. ESC's participation in this case is limited only to the precise questions before the Court and does not indicate ESC's support of a cargo liability regime that allows for the application of maritime liability limits to inland carriers by contract or otherwise.

INTEREST OF THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION, INC.

The Australian Peak Shippers Association, Inc. ("APSA") was founded in 1990 after the demise of its predecessor, the Australian Shippers Council. APSA is the Designated Peak Shipper Body declared by the Federal Minister of Transport under Part X of the Australian Trade Practices Act. The organization represents the interests of Australian exporters generally, dealing with international liner cargo shipping services in matters such as frequency of shipping services; terms and conditions of bills of lading; ocean freight rates and surcharges; and cargo liability legislation. One of APSA's primary purposes is to consolidate and communicate to liner shipping operators, other industry groups, port authorities, and governments its members' views on all matters concerning the shipment of liner commodities. Also, it serves as a point of contact for consultation and negotiation with liner shipping operators, other industry groups, port authorities, and governments, and ensures that the needs of, and constraints on, Australia's liner trades are considered in the formulation of government policy.

STATEMENT

A substantial volume of international cargo moving across the oceans is tendered by shippers to ocean transportation intermediaries known in the United States as non-vessel-operating common carriers ("NVOCCs").[2] An NVOCC does not own or operate the assets used to move cargo; rather, it makes arrangements with an ocean carrier to physically transport the goods. If the service required is for "through" transportation, involving an inland origin and/or an inland

[2] The Federal Maritime Commission has estimated that NVOCCs are involved in 25% of all containerized cargo entering or exiting the United States by ocean carrier. Federal Maritime Commission, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998, at 84 (2001).

destination, then the ocean carrier hired by the NVOCC usually engages the inland carriers (i.e., railroad or truck) to perform the necessary inland components.

This case concerns the transportation of a through international shipment that was arranged for a shipper (Kirby) by an entity that appears to have been an NVOCC (ICC). The shipment was transported from Australia to Alabama. The NVOCC hired an ocean carrier (Hamburg Sud) to perform the transportation service. Two separate bills of lading (or contracts of carriage) were issued with respect to the shipment: The NVOCC issued a bill of lading to the shipper, and the ocean carrier issued a bill of lading to the NVOCC. The ocean carrier hired an inland carrier, Norfolk Southern, to deliver the goods to the final destination. The shipment was extensively damaged as a result of the railroad's negligence. When the shipper sought to recover its loss from the railroad, the railroad claimed, among other defenses, that the applicable contracts involved with the shipment both included "Himalaya clauses" that entitled it to benefit from the ocean carrier's and the NVOCC's liability limits.[3]

One of the questions that this Court has been asked to resolve is whether ICC operated as the agent of Kirby when it hired Hamburg Sud. If ICC is Kirby's agent, then Kirby would become bound by the terms in the ocean carrier's bill of lading. However, as explained further below, under industry practices, the shipper is not a party to the NVOCC/ocean carrier contract, has no dealings with the ocean carrier, and often does not even know the identity of the ocean carrier or any subcontractors that may be hired by that carrier. The Eleventh Circuit decided properly that the status and func-

[3] By including a Himalaya clause in the carrier's bill of lading, the COGSA limitation of liability can be extended to agents of the carrier and to other entities. Saul Sorkin, GOODS IN TRANSIT § 14.15 (2004).

tions of ICC and the relationship between ICC and Kirby were utterly inconsistent with that of an agency. Thus, the Himalaya clause in Hamburg Sud's bill of lading could not be enforced against Kirby. Of course, Kirby is (and should be) bound by ICC's bill of lading, which is the *only* contract in which it directly participated.

This Court should uphold the Eleventh Circuit's ruling on the agency issue, not only because such a result is contrary to the facts of the case, but also because of the uncertain and harmful consequences that would occur if shippers were forced into contractual privity with unknown parties under unknown terms. The creation of a new agency rule in the context of this case, which could have broad application to dealings between *all* NVOCCs and shippers in the future, would adversely affect a shipper's right to recover cargo losses from negligent parties. It would also unnecessarily expose the shipper to potential liability and other claims (e.g. for freight) that could be asserted by the ocean carrier based on the terms in its bill of lading that were never accepted by the shipper.

The other question before the Court over the meaning of the Himalaya clause in ICC's bill of lading is largely a matter of contract interpretation. As that question does not have the same long-term implications for the industry as the agency question, the amici herein do not address that issue in detail in this brief. However, the organizations herein strongly support the analysis of the respondents and their other supporting amici as to the meaning of ICC's Himalaya clause. Furthermore, shippers have a vital interest in opposing the broad construction of Himalaya clauses, as proposed by petitioner and others, since that could create a disincentive for carriers to take proper care of the goods and deliver them in a timely fashion. Excusing negligent parties from the consequences of their misconduct through an unprecedented and expansive interpretation of Himalaya clauses could undermine safety

and efficiency. Moreover, contrary to the railroad's position that the parties involved in an international multimodal shipment share a commercial expectation that the lowest liability limit shall apply, the expectation of shippers is that they will be subject to and get the benefit from only those contracts in which they directly participate.

The amici herein have a direct and substantial interest in the outcome of this case and urge this Court to affirm the Eleventh Circuit's decision.

A. Shippers' Use of Ocean Transportation Intermediaries

The transportation of goods by sea from one country to another using carriers providing international intermodal transportation services has evolved over the past decades to allow for the safe, efficient and transparent shipment of goods around the world. Although the international carriage of goods on a "through" basis can be considered complex because it involves multiple parties and modes of transportation,[4] from the perspective of the shipper tendering the cargo and/or the receiver of the goods at the destination, the transportation process can be stream-lined and effectively managed through the choice of service provider and the contracts with that provider.

When a company needs to import or export cargo across the sea, it may choose to hire an ocean carrier directly, or it may choose a transportation intermediary skilled in the area of ocean transportation. A shipper that hires an ocean transportation intermediary may do so for any number of reasons, including, *inter alia,* to secure better pricing than it can obtain on its own; to obtain assistance in navigating the intricacies of ocean shipping from an expert knowledgeable

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[4] Sorkin, *supra*, at §§ 1.12[3] and 1.13.

in the field; or to meet its commercial needs based on the variety of services offered by the intermediary.

For example, an intermediary that operates as a consolidator often can get a shipper with smaller volumes of cargo (i.e., less than a full container load) a better price than the shipper can obtain on its own because the intermediary may consolidate the shipper's cargo with other shippers' cargo. A shipper with limited experience in international transportation may hire an intermediary for its skill and knowledge in arranging for the transportation of cargo, securing vessel space, consolidating cargo, preparing shipping documents, arranging for storage and/or inland transportation, and clearing cargo through customs. 46 C.F.R. § 515.2(l). In addition, the service offerings of some ocean transportation intermediaries, also referred to as third-party logistics providers, have grown tremendously over the past decade to include menus that permit "one-stop shopping" by shippers, such that the intermediary handles nearly every aspect of the shipper's logistics function and serves as its primary carrier.[5]

In short, for the variety of reasons indicated above, but also because transportation is not the shipper's primary business (it may be manufacturing, retail, technology, or some other business sector), many shippers choose to hire an intermediary that specializes in the field of international transportation.

B. Regulation of Ocean Transportation Intermediaries in the United States

In the United States, ocean transportation intermediaries are regulated under the Shipping Act. The Shipping Act recognizes two types of ocean transportation intermediaries: (1) NVOCCs and (2) ocean freight forwarders. An NVOCC is defined as "a common carrier that does not operate the

[5] *See* William J. Augello, TRANSPORTATION, LOGISTICS AND THE LAW at 192 (2001).

vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. App. § 1702(17)(B). Thus, an NVOCC serves a dual role. As to its shipper customer, it is a common carrier that holds out to provide the transportation service for compensation and assumes responsibility (or liability) to deliver the cargo safely to the destination. 46 U.S.C. App. § 1702(6). An NVOCC issues to its shipper customer its own bill of lading, which identifies the NVOCC as the carrier performing the service. The NVOCC must also adhere to rules and requirements applicable to common carriers, including, *inter alia*, the requirements to publish prices in a tariff, charge only the tariff rates, and refrain from unjustly discriminating between customers. 46 U.S.C. App. §§ 1707(a) and 1709(b). As to the ocean carrier that the NVOCC hires to physically transport the cargo, the NVOCC is itself the shipper. Indeed, the cargo owner and the NVOCC each independently qualify as a "shipper" under the definition of that term in the Shipping Act. 46 U.S.C. App. § 1702(21)(A) and (E).

An ocean freight forwarder is not a common carrier. It is defined as a person in the United States that "dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments *on behalf of shippers*." 46 U.S.C. App. § 1702(17)(A) (emphasis added). When the ocean freight forwarder arranges ocean transportation, it does not issue a bill of lading; rather, only the ocean carrier issues one. Furthermore, the ocean freight forwarder does not appear as the shipper on this bill of lading. Instead, this document identifies the underlying shipper as the "shipper" and the ocean carrier as the "carrier." The rules of the Federal Maritime Commission ("FMC"), the federal agency charged with administering the Shipping Act, expressly recognize the ocean freight forwarder/shipper rela-

tionship as one of agency.[6] Based on this agency status, only an ocean freight forwarder, but not an NVOCC, is subject to special duties and obligations with respect to its principal, the shipper. *See* 46 C.F.R. § 515.32. Thus, although NVOCCs and ocean freight forwarders are both ocean transportation intermediaries under the Shipping Act, there are distinct differences in their status and in how they are regulated.

C. The Commercial Relationships and Dealings Between Shippers, Ocean Transportation Intermediaries, and Vessel Operators

The regulatory structure established by the Shipping Act influences shippers' choices when selecting intermediaries to assist in international transportation arrangements. When a shipper chooses an NVOCC, its expectation is that it is dealing with a carrier who will be responsible to perform all aspects of an international intermodal movement. Typically, a shipper and NVOCC agree in advance upon pricing and other terms applicable to the shipment, depending on the services required by the shipper. The NVOCC then publishes the applicable rate in its tariff and issues a bill of lading to the shipper. The bill of lading serves as the contract of carriage and as the receipt for the cargo. *Tokio Marine & Fire Ins. v. M/V L. Jalabert Bontag*, 624 F. Supp. 402, 407–408 (n.5) (S.D.N.Y. 1985). In the case of a shipment moving across the sea from an inland origin to an inland destination, the NVOCC bill of lading usually covers the shipment in its entirety, "door-to-door."

[6] *See* 46 C.F.R. §§ 515.32 and 515.42(a). Ocean freight forwarders have also been determined to be in a fiduciary relationship with their principal, the shipper. *United States v. Ventura*, 724 F.2d 305, 311 (2d Cir. 1983).

For shipments involving the United States, the NVOCC bill of lading is subject to COGSA.[7] In general, the COGSA liability limits apply to claims made against the NVOCC for cargo loss or damage, unless the parties agree to increase the NVOCC's liability, usually in exchange for a higher transportation rate. 46 U.S.C. App. § 1304(5). Although COGSA does not apply to inland transportation or to services outside those performed "tackle-to-tackle,"[8] the NVOCC's bill of lading may include a Himalaya clause that extends the liability provisions in the bill of lading to its agents and contractors involved in the performance of the transportation service. However, there is no uniform Himalaya clause and the scope and breadth of such clauses vary widely across carrier bills of lading.

When a shipper hires an NVOCC to transport a through shipment, it may know that subcontractors, such as ocean and inland carriers, are likely to be involved with the shipment. However, from the shipper's perspective, it is dealing *only* with the NVOCC and is a party to and involved in *only* a single contract between itself and the NVOCC (i.e., the NVOCC bill of lading). The shipper does not direct, control or have any involvement with the contract between the NVOCC and the ocean carrier or the contract between the ocean carrier and any other contractor it may hire. As demonstrated in this case, the liability terms under the NVOCC's bill of lading may not be identical to those in the ocean carrier's bill of lading issued for the same shipment. Indeed, the terms of bills of lading issued by different carriers, whether they be NVOCCs or ocean carriers, are rarely, if ever, exactly the same.

[7] 46 U.S.C. App. § 1300. *See also In re The M.V. Floreana*, 65 F. Supp.2d 489, 491 (S.D. Tex. 1999).

[8] Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 10–16 (4th ed. 2004).

Moreover, it is entirely possible that the NVOCC and the ocean carrier it hires will enter into a confidential agreement, other than a bill of lading, known in the U.S. trades as a service contract.[9] A service contract is subject to certain minimal regulation under the Shipping Act and is required to be filed confidentially with the FMC. 46 U.S.C. App. § 1707(c)(2). These contracts are required to include certain terms, such as rates, shipper volume commitment, carrier service commitment, commodity, and origins and destinations, among others. *Id.* A service contract may also include liability terms for cargo loss or damage.[10] After these contracts were permitted to be entered into confidentially, through amendments to the Shipping Act adopted in 1998,[11] they quickly became the overwhelmingly preferred manner of conducting shipping business in the U.S. trades.[12] Thus, whenever an NVOCC and ocean carrier enter into a confidential service contract that includes the ocean carrier's liability for cargo damage, the underlying shipper has no right to access or review that agreement. Although an NVOCC may enter into a service contract with an ocean carrier (based on its status as a shipper), it is prohibited under the Shipping Act from entering into such an agreement with its shipper customer.[13]

Not only does a shipper lack control over and access to contractual terms between the NVOCC and the ocean carrier,

[9] 46 U.S.C. App. § 1702(19).

[10] A confidential contract may expressly address the matter of cargo liability or it may incorporate the liability terms included in the ocean carrier's bill of lading.

[11] Sec. 106 of the Ocean Shipping Reform Act of 1998, 46 U.S.C. App. § 1707(c)(2).

[12] Federal Maritime Commission, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998 at 17 and 84 (2001).

[13] The definition of "service contract" in 46 U.S.C. App. § 1702(19) refers only to "ocean" common carriers, thereby excluding NVOCCs.

the shipper does not select the contractors that will physically transport the goods. Carrier selection, routing, and other details of the transportation operations are left to the NVOCC and its subcontractors. Although the shipper's contract with the NVOCC may include the name of the vessel on which the goods will be carried, that information alone is often insufficient for a shipper to identify the ocean carrier performing the transportation because of the common practice of vessel sharing arrangements ("VSAs"), which are prevalent around the world.[14] Under VSAs, ocean carriers enter into agreements that are filed with the FMC and that permit the members of the agreement to charter space (or slots) on the other carrier members' ships.[15] In these arrangements, an ocean carrier that issues a bill of lading to an NVOCC (or any other shipper) may arrange for the cargo to be transported on another ocean carrier's vessel. Thus, if a shipper that contracts with an NVOCC knows only the name of the vessel on which its cargo will be carried, in many cases, the owner or operator of that vessel will not be the carrier whose bill of lading is issued to the NVOCC.

Finally, if a shipper using an ocean transportation intermediary desires more control over the transportation providers and the terms of the applicable contracts, it can hire an ocean freight forwarder instead of an NVOCC. When dealing with an ocean freight forwarder, the shipper obtains both transparency and contractual privity between itself and the ocean carrier. In international ocean-going shipments arranged by an ocean freight forwarder, the ocean carrier issues its bill of lading directly to the shipper and, under the FMC's rules, the forwarder may only be listed on the bill of

[14] Federal Maritime Commission, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998 at 26 (2001).

[15] Mary T. Reilly, *Symposium: Identity of the Carrier: Issues Under Slot Charters*, 21 TUL. MAR. L. J. 505, 506 (2001).

lading as the shipper's agent.[16] In sum, when a shipper uses an ocean freight forwarder, the forwarder serves as the shipper's agent, and the shipper has direct access to and knowledge of the liability and other contractual terms applied by the ocean carrier.

SUMMARY OF ARGUMENT

The Eleventh Circuit properly concluded that ICC was not the agent of Kirby when it contracted with the ocean carrier, Hamburg Sud, and thus Kirby was not bound by Hamburg Sud's bill of lading. ICC was an entity that appeared to have acted as an NVOCC, which is a regulated intermediary under the Shipping Act that operates in the dual capacity of a common carrier vis-à-vis its shipper customer and a shipper vis-à-vis the ocean carrier. An NVOCC holds a different regulatory status than an ocean freight forwarder, which unquestionably operates as a shipper's agent. The creation of a new rule that would define an NVOCC as the shipper's agent would undermine the currently clear regulatory distinctions between NVOCCs and ocean freight forwarders. The commercial dealings between a shipper and an NVOCC also fail to support an agency relationship. A shipper hires an NVOCC for its expertise in the business of international transportation, and the NVOCC performs the transportation service without supervision or control by the shipper. The NVOCC acts as an independent contractor and represents its own interest in its dealings with the ocean carrier.

Because the shipper has no involvement with the arrangements between the NVOCC and the ocean carrier and is unaware of the terms of the ocean carrier's bill of lading, it is both inappropriate and unfair to enforce against the shipper contract terms that it did not have the right or opportunity to

[16] 46 C.F.R. § 515.42(a) ("The licensed freight forwarder's name may appear with the name of the shipper [on the bill of lading], but the forwarder must be identified as the shipper's agent.")

accept. Subjecting a shipper to two separate and inconsistent contracts of carriage for the same shipment would not only adversely affect the shipper's right to recover cargo losses from negligent parties but could also subject the shipper to conflicting obligations or unanticipated claims by the ocean carrier.

Petitioner and its supporting amici claim that ICC's bill of lading put Kirby on notice of the ocean carrier's participation in the transportation service because it identified the name of the vessel on which the cargo was transported. However, because of the prevalence of vessel sharing arrangements between ocean carriers, the fact that a shipper may know the name of the vessel does not enable the shipper to identify the ocean carrier that contracts with the NVOCC. Indeed, in this very case, the vessel *Queensland Star* that was listed on ICC's bill of lading was not owned or operated by Hamburg Sud, the contracting ocean carrier. Rather, it was owned by another ocean carrier, Blue Star Line, which participated in a space sharing agreement with Hamburg Sud. Thus, the information on ICC's bill of lading could not have led Kirby to reasonably expect that it would be bound by Hamburg Sud's bill of lading terms. Furthermore, the argument by an amicus for petitioner that the shipper is bound by the ocean carrier's bill of lading under the filed rate doctrine fails because the filed rate doctrine applies only to the shipper and carrier parties to the transportation contract. Because Kirby is not a party to the Hamburg Sud bill of lading, it is not bound to that contract by the filed rate doctrine.

Moreover, because the ocean carrier obtains the statutory protection of COGSA upon issuance of its bill of lading, and because there are commercial solutions available that would allow the ocean carrier and its subcontractors to manage any exposure to greater liability than provided under the ocean carrier's bill of lading, the decision of the Eleventh Circuit does not disrupt the policies of COGSA. Finally, state law tort remedies against inland carriers are not preempted by

COGSA or any other federal statute, and the decision below does not cause the ocean carrier to violate antidiscrimination provisions under the Shipping Act. Discrimination does not result if the factual circumstances surrounding the shipment justify different treatment between the carrier's customers.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULING THAT ICC WAS NOT THE AGENT OF KIRBY IS CONSISTENT WITH THE SHIPPING ACT OF 1984 AND THE PRINCIPLES OF AGENCY LAW

Petitioner and its supporting amici mistakenly argue that Kirby must be bound by the terms of the underlying ocean carrier's bill of lading because the NVOCC purportedly contracts with that carrier as the shipper's agent. The regulation of NVOCCs under the Shipping Act and the law of agency squarely refute their contention.

A. NVOCCs Are Not the Agents of Shippers Under the Shipping Act.

As explained above, the Shipping Act clearly distinguishes between two types of ocean transportation intermediaries: An ocean freight forwarder, which serves as the agent of the underlying shipper, and an NVOCC, which does *not* serve as the agent of the underlying shipper. The words of the statute establish that an ocean freight forwarder acts *on behalf of shippers*,[17] whereas an NVOCC serves the dual status of both a common carrier and a shipper.[18] The "carrier/shipper" relationship between the NVOCC and its customer does not translate to an "agency." Rather, it is akin to a "seller/buyer" relationship. Although an NVOCC is also a shipper in its

[17] 46 U.S.C. App. § 1702(17)(A)(i).

[18] 46 U.S.C. App. § 1702(17)(B).

dealings with the ocean carrier, the NVOCC's status in that relationship does not transform the NVOCC/Shipper relationship into agency, particularly aince the underlying shipper lacks control over the NVOCCs dealings with the ocean carrier. Furthermore, an NVOCC independently qualifies as a "shipper," *in addition to* the cargo owner and the receiver of the goods, under the definition of that term in the Shipping Act. 46 U.S.C. App. § 1702(21)(E). The inclusion of an NVOCC in the "shipper" definition, which notably excludes ocean freight forwarders, further supports that an NVOCC does not serve as the underlying shipper's agent. If it were the shipper's agent, then two different parties would become the "actual" shipper for the same shipment for regulatory purposes. Such a result would be illogical and cause substantial confusion in the administration of the Shipping Act.

In addition to the statute's regulatory distinctions, the rules of the FMC do not support petitioner's agency argument. As noted above, the FMC's rules characterize a shipper's relationship with an ocean freight forwarder as that of "principal and agent."[19] However, no such comparable agency status has been conferred upon the shipper/NVOCC relationship. And, for the FMC to do so would make no sense, since the statute defines that relationship to be "shipper/carrier."

A finding by this Court that ICC was acting as the agent of Kirby when it contracted with Hamburg Sud would result in a rule that fundamentally alters the regulatory status of NVOCCs. It would also unnecessarily blur the currently clear distinctions between NVOCCs and ocean freight forwarders, causing substantial confusion for both the regulators of the industry and the commercial parties who have dealings with NVOCCs. Moreover, if this Court were to

[19] 46 C.F.R. §§ 515.2(q), 515.32, 515.33, 515.41, and 515.42.

conclude, solely for the purpose of COGSA, that the status of an NVOCC differs from the independent contractor status established under the Shipping Act, then it would be creating an inconsistency between two federal laws. It is a long-standing rule that federal statutes should be interpreted consistently to the greatest extent possible.[20] That rule should be particularly applicable here when the two statutes involved both pertain to ocean transportation matters. Thus, this Court should avoid creating such a conflict, which would result if ICC is found to be Kirby's agent.

It is also significant that the government, which is supporting the petitioner in this case, agrees that ICC was not acting as the agent of Kirby when it entered into the contract with Hamburg Sud, based in part on its NVOCC status. The government's brief, which includes the FMC, as well as other agencies experienced in shipping and other transportation modes, specifically states:

> ICC was not Kirby's "agent" as that term has traditionally been understood at common law, since no fiduciary relationship existed and Kirby lacked authority to direct and control ICC in its performance of the contract. Furthermore, *because ICC assumed the responsibilities of a common carrier, it was not the type of transportation intermediary that has historically been characterized as the shipper's "agent."* Government Brief, at 12 (emphasis added).

B. Shippers Do Not Direct or Control the Performance of NVOCCs.

The agency theory advanced by the petitioner and its supporting amici also fails under common law agency principles. This Court has stated that "[a]gency is the fiduciary relation which results from the manifestation of

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[20] *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 566–567 (n. 22) (1979).

consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 392 (1982) (citation omitted). The essential elements of an agency arrangement are the principal's ability to direct and control the agent and the fiduciary relationship. *Id.* at 393. In the shipping industry, shippers do not control, or have the right to control, NVOCCs that furnish transportation services. A shipper hires an NVOCC for a variety of reasons, including its skill and experience in moving goods from point A to point B. Shippers provide the cargo and the NVOCC arranges for the performance of the desired transportation services, relying on its own transportation expertise and dealings with other carriers and service providers. As the NVOCC's customer, the shipper is not involved in this process. It typically does not select the ocean carrier or other downstream service providers. It does not control the routing of the shipment or other operational details of the transportation movement. And, the shipper does not have any control over the contractual terms negotiated by the NVOCC and the underlying ocean carrier. Because of the absence of the requisite "control" element, the shipper is not a "principal" and the NVOCC is not an "agent" under agency law.

A recent motor carrier case is instructive on this point. In *Jackson Rapid Delivery Service v. Thomson Consumer Electronics*, 210 F. Supp.2d 949 (N.D. Ill. 2001), the court found that a transportation broker did not act as the shipper's agent and could not bind the shipper to certain motor carrier bills of lading. The court noted that the broker "had independent control over picking motor carriers, negotiating a rate with the carriers, and purchasing its own supplies." *Id.* at 954. Also, the broker entered into separate transportation service contracts with the carriers. *Id.*

A shipper's dealings with an NVOCC are no different. The contract between the NVOCC and the shipper does not

create a fiduciary relationship. It is an arms-length deal, no different from ordinary commercial transactions that, under settled law, do not give rise to fiduciary duties. *See South Atlantic Ltd. v. Riese*, 284 F.3d 518, 533 (4th Cir. 2002); *Thomas v. Chase Manhattan Bank*, 1 F.3d 320, 328 (5th Cir. 1993); *First Citizens Fed. Sav. & Loan v. Worthen Bank & Trust*, 906 F.2d 427, 431 (9th Cir. 1990). Indeed, the NVOCC is free to charge the shipper the highest price that the market will bear for the transportation service and is not constrained to offer the shipper the most competitive price it can find. In each transaction, the NVOCC pursues its own interest to maximize its own profit. Because the NVOCC does not necessarily align its interest with the shipper's no fiduciary relationship arises. In this case, the facts do not lead to a contrary conclusion. There is no evidence that Kirby directed or controlled ICC's handling of the shipment, and ICC's status as an NVOCC is otherwise inconsistent with agency principles.

II. REVERSAL OF THE ELEVENTH CIRCUIT'S RULING ON THE AGENCY QUESTION WOULD INTERFERE WITH A SHIPPER'S CONTRACTUAL FREEDOMS AND CAUSE SUBSTANTIAL UNCERTAINTIES

The creation of a new agency rule in order to bind the shipper to the NVOCC's contract with an ocean carrier would significantly interfere with the contractual rights of the shipper. As explained above, when a shipper hires an NVOCC, it deals only with the NVOCC. The shipper has no involvement with the ocean carrier that the NVOCC selects to perform the transportation. It would be patently unfair to bind a shipper to the ocean carrier's bill of lading given the shipper's lack of participation in the contract and its lack of knowledge of the terms of the contract.

Even if the shipper knew the identity of the ocean carrier, the shipper would not have the opportunity to review, object to, or accept the contractual terms to which it would become bound, if the NVOCC is found to be its agent. A result of this sort would completely interfere with the shipper's basic right of "Freedom to Contract." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."); *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 652 (5th Cir. 2004) ("Under general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein.") (citation omitted). Furthermore, it would defeat one of the purposes of hiring the NVOCC in the first place, which is to allow the shipper to reduce the number of contracts and parties involved in the transaction.

In addition, the agency rule desired by petitioner would force a single shipper into two different contracts of carriage with two different carriers for the same shipment, creating consequences that are uncertain at best and harmful to the shipper at worst. Because there is no uniform bill of lading prescribed for international intermodal shipments, the liability limits and other terms included in the NVOCC bill of lading may be entirely inconsistent with those included in the vessel operator's bill of lading. The NVOCC, who often acts as a consolidator, does not necessarily have the same interest and bargaining power as the shipper. Typically, the NVOCC relies on cargo volumes from many different shippers in its negotiation with the ocean carrier, and therefore it may be able to secure better pricing and liability terms than any of its individual customers. The statement of an amicus supporting petitioner that "ICC could sell to Kirby only what ICC was able to buy from Hamburg Sud" is simply inaccurate. Brief of the World Shipping Council at 16.

While a shipper should be held to the benefit of its bargain with the NVOCC, there simply is no bargain for the shipper with respect to the ocean carrier's bill of lading. In fact, as demonstrated by this case, the ocean carrier's bill of lading may include more onerous liability terms than were part of the shipper's contract with the NVOCC. The new agency rule desired by petitioner not only would impede a shipper's rights to recover cargo losses from negligent parties, but also is likely to have an impact that reaches beyond the matter of cargo liability. Ocean carrier bills of lading contain numerous contractual terms affecting a wide range of issues. If an NVOCC is found to be the agent of the shipper when it contracts with the ocean carrier, presumably the shipper would become bound to *all* of the terms included in the ocean carrier's contract, including freight obligations, indemnities, and designated forum for claims, among others. The unfairness and uncertainties that would be created by the agency rule further justify an affirmance of the decision below.

III. THE FILED RATE DOCTRINE DOES NOT BIND KIRBY TO THE HAMBURG SUD BILL OF LADING

An amicus supporting petitioner wrongly argues that it is proper to bind the shipper to the underlying ocean carrier's bill of lading because the shipper that engages an NVOCC knows that a second bill of lading will be issued, and can be held to have knowledge of the terms of that bill of lading pursuant to the filed rate doctrine. World Shipping Council Br. at 17. This argument is premised on the fact that the Shipping Act requires common carriers to publish the terms of bills of lading in their tariffs. 46 U.S.C. App. § 1707(a)(1)(E). However, this claim is mistaken in both fact and law. Assuming the shipper knows of an ocean carrier's

involvement,[21] there remain a number of reasons why it will not be able to easily identify the specific ocean carrier hired by an NVOCC to transport its cargo, locate that ocean carrier's tariff, and review the bill of lading in the tariff in time to object to any inconsistent or unacceptable terms. First, for practical reasons, the NVOCC is likely to have dealings with numerous ocean carriers, and the bill of lading that it issues to the shipper may not specifically identify the underlying carrier. In fact, as was the case here, the cargo may have sailed before the shipper even obtains the NVOCC's bill of lading. In addition, the NVOCC intentionally may not identify the underlying carrier because doing so would assist the shipper in determining the NVOCC's mark-up over the ocean carrier's rate. Furthermore, a shipper may not be able to identify the ocean carrier because its identity could be disguised, if the initial NVOCC contracts with a second NVOCC that, in turn, hires the ocean carrier, causing multiple bills of lading to be issued.

Second, even if the name of the vessel appears on the NVOCC's bill of lading, the shipper cannot necessarily identify the ocean carrier that has contracted with the NVOCC because, as noted earlier, ocean carriers regularly share space on each other's vessels. Under vessel sharing arrangements, cargo "booked" under one carrier's bill of lading may actually be transported on another carrier's vessel. Reilly, *supra*, at 510. In fact, in this case, the vessel *Queensland Star,* on which Kirby's cargo was transported and which was identified in ICC's bill of lading, was not owned or operated by the underlying ocean carrier, Hamburg

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[21] Initially, the amicus asserts that whenever a shipper hires an NVOCC, it always knows that the NVOCC is not the ocean carrier and that an actual ocean carrier will move its cargo. This may be true on most occasions, but it is certainly not correct on all. Thus, it is inaccurate to posit that the shipper always knows that a second agreement is in play each time it engages an NVOCC.

Sud. Rather, it was owned by another ocean carrier, Blue Star Line, which participated in a vessel sharing agreement with Hamburg Sud and others.[22] Kirby's knowledge of the vessel name could not have enabled it to determine the identity of the ocean carrier that actually contracted with ICC to transport the cargo. Thus, Kirby could have no reasonable expectation that it would be bound by Hamburg Sud's bill of lading.

In fact, even assuming, *arguendo*, that the only ocean carrier bill of lading that Kirby reasonably could have expected to apply is that of Blue Star Line, since that carrier was the owner of the vessel named on ICC's bill of lading, the liability terms in Blue Star Line's bill of lading are significantly different from those in the Hamburg Sud bill of lading. *See* Exhibit 1, para. 5(B)(2)(d). Specifically, with respect to through shipments (or "combined transport") the Blue Star bill of lading establishes that for inland transportation procured by the ocean carrier, the responsibility of the ocean carrier is subject to the "inland carrier's contracts of carriage and tariffs." Exhibit 1, para. 5(B)(2)(d). Thus, under the liability structure of the Blue Star

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[22] *See Blue Star's M.V. "Queensland Star" 2.* http://www.bluestarline.org/act/act6.html (visited May 27, 2004) (detailing the ownership of *Queensland Star*). In addition, at the time of the shipment, Hamburg Sud participated in several ocean carrier agreements that permitted vessel sharing in the Australia trades with other carriers, including Blue Star Line. These agreements include (1) the *Columbus/Pace Cross Charter Agreement*, No. 217-010746, 50 Fed. Reg. 15224 (April 17, 1985), which was amended several times over the years, *see Columbus/PACE/SCNZ/BSL/PAD Space Charter and Sailing Agreement*, 52 Fed. Reg. 31446 (Aug. 20, 1987) and 58 Fed. Reg. 43360, 43361 (Aug. 16, 1993); (2) *Australia/United States Containerline Association Agreement*, No. 202-011497-001, 61 Fed. Reg. 1934 (Jan. 24, 1996); and (3) *United States/Australasia Interconference and Carrier Discussion Agreement*, as amended in 1993, No. 203-011117-015, 58 Fed. Reg. 37482, 37483 (July 12, 1993).

bill of lading, it would not have been reasonable for Kirby to have anticipated that maritime liability limits would apply to inland carriers.

In short, it is fairly certain that the shipper will not easily be able to locate and review the relevant tariff and bill of lading of the underlying ocean carrier. However, even assuming that a shipper could timely determine and obtain a copy of the ocean carrier's bill of lading, if the shipper finds objectionable contract terms, it cannot change them. It is patently unfair to bind the shipper to terms that are unknown or, even if discovered, are ultimately immutable.

Furthermore, amici for petitioner offer a strained legal interpretation of the filed rate doctrine to support the argument that Kirby should be held by operation of law to have notice of Hamburg Sud's bill of lading because that bill of lading is required to be published in Hamburg Sud's tariff. It is true that "carriers and shippers alike are charged with constructive notice of tariff filings." *Security Servs. v. Kmart Corp.*, 511 U.S. 431, 443 (1994). However, it is *not* true that an ocean carrier can enforce its tariff against a party with whom it does not have any dealings or a contract: The filed rate doctrine applies between the shipper and the carrier, as parties to the transportation contract. *See Maislin Indus. v. Primary Steel*, 497 U.S. 116, 126 (1990) ("This Court has long understood that the filed rate governs the legal relationship between shipper and carrier."); *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.") Thus, because Kirby is not a party to the Hamburg Sud bill of lading, it cannot be charged with knowledge of the terms of that contract. Indeed, it would be a novel and improper extension of the filed rate doctrine to

charge a stranger to the transportation contract with constructive knowledge of the underlying carrier's tariff.

IV. THE ELEVENTH CIRCUIT'S DECISION DOES NOT DISRUPT THE COGSA SCHEME

Petitioner and its supporting amici claim that, under the decision below, ocean carriers and their subcontractors will be unable to rely on COGSA's liability limits for shipments tendered by NVOCCs, which will cause substantial uncertainty and disturb ocean carrier pricing practices. This argument drastically overstates the impact of the Court of Appeals' decision and ignores the fact that there are commercial solutions available that would allow the underlying carriers and contractors to manage any liability risks created by the decision. First, ocean carriers will rarely lose the protection of a liability limitation. Once the ocean carrier issues its bill of lading, it triggers the statutory liability limits and defenses provided under COGSA, assuming the damage occurs during the "tackle-to-tackle" period.[23] Second, most NVOCC bills of lading include Himalaya clauses that will extend the benefits of COGSA (or another limited liability regime) at least to the ocean carrier—typically the first servant in the chain of providers for NVOCC cargo.

Whether the COGSA liability limit should be extended to other agents and contractors of the ocean carrier is not a statutory right but is purely a commercial matter. In fact, well before the Eleventh Circuit's ruling, there was no guarantee that an ocean carrier's Himalaya clause would be found to apply to an inland carrier, since the applicability of

[23] *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983) ("[T]he Carriage of Goods by Sea Act (COGSA) applies *ex proprio vigore* to every bill of lading which evidences a contract for the carriage of goods by sea to or from ports of the United States in foreign trade.")

the clause depends on its specific wording.[24] The uncertainty in the application of Himalaya clauses that petitioner argues is created by the Eleventh Circuit's decision to some degree already exists today. However, the underlying carriers and contractors that accept NVOCC cargo can adequately manage the risk that they may not obtain the benefit of a Himalaya clause through everyday commercial means, including the use of indemnity clauses that would provide protection against potential liability above and beyond COGSA's liability limits. Moreover, before accepting a shipment, the ocean carrier could also request that the NVOCC provide it with a copy of its bill of lading, or it could obtain a copy from the NVOCC's tariff.

It is not overly burdensome or unrealistic for ocean carriers, railroads, and other contractors involved in through transportation to undertake such actions when dealing with NVOCC cargo. As noted above, ocean carriers and NVOCCs already negotiate, under the Shipping Act, confidential service contracts that include a package of terms relating to international intermodal transportation. Thus, an ocean carrier could seek to address the matters of cargo liability limits and related indemnities in a service contract and/or it may include an indemnity clause in the terms of its bill of lading. It would also not be out of the ordinary or inefficient for contractors of the ocean carrier to seek in their contracts with the ocean carrier indemnities that protect their interests, and ocean carriers could then insure against any known risks. These entities already enter into commercial agreements relating to the transfer of cargo between the various modes of transport and could simply include appropriate risk allocations in these agreements. On the other hand, it would be inappropriate for this Court to create a special agency rule

[24] *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 305 (1959) (extension of COGSA liability limit must be clearly expressed in bill of lading language).

aimed at expanding COGSA's liability limits to inland carriers, since that is a matter better left for Congress.

V. THE ELEVENTH CIRCUIT'S DECISION IS NOT PREEMPTED

There is no basis for amicus United States' argument that a shipper's state law cause of action against the underlying carrier or its agents for injury to goods is preempted. Generally speaking, this Court recognizes preemption (i) where Congress expressly legislates that result in the text of a statute; (ii) where that result is implied by federal statute; or (iii) where state law conflicts with federal law. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987). However, because of concerns for federalism, this Court is reluctant to find that federal law preempts state law. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Here, the United States has not identified a single section of COGSA (or any other federal statute) that expressly mandates preemption of state law causes of action for injury to goods. *See Associated Metals and Minerals Corp. v. Alexander's Unity MV*, 41 F.3d 1007, 1016 (5th Cir. 1995) ("In the more than half century that COGSA has existed, no circuit has indicated that, through COGSA, Congress intended to eliminate the tort cause of action for damage to cargo. Nor does the legislative history of COGSA manifest such an intent.") Implied preemption, in turn, arises where Congress "has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l*, 468 U.S. 491, 501 (1984). As explained by this Court, Congress's purpose in enacting COGSA was to "establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Herd & Co.*, 359 U.S. at 301. In pursuing this narrow objective, Congress did not occupy the field of liability for injury to goods transported by an underlying ocean carrier or

its agents, and thus did not displace state law. *See Associated Metals and Minerals Corp. v. Alexander's Unity MV*, 41 F.3d at 1016. Finally, a shipper's state law cause of action against an underlying carrier or its agents is not barred by conflict preemption. Such a suit would not stand as an obstacle to enforcement of federal law because COGSA would continue to apply between the shipper and the NVOCC and the NVOCC and the underlying carrier.

In an effort to bolster its preemption argument, the government posits that allowing state law causes of action against underlying carriers and their agents would disrupt the ocean carrier industry's pricing practice of linking transportation rates to liability exposure. However, this pricing practice within the industry is not prescribed by COGSA or any other federal law. As such, it should not, and does not, override causes of action existing under state law.

The United States is also incorrect in asserting that the decision below would cause ocean carriers to violate the Shipping Act's provisions prohibiting discrimination. The government's argument is apparently premised on different liability limits or rates that may apply, on the one hand, to the proprietary shipper, and on the other hand, to the NVOCC. However, assuming that antidiscrimination principles even apply in the context of the decision below, which is uncertain at best, the prohibitions against unjust discrimination and undue preferences in common carrier transportation have always been applied with regard to the specific circumstances and conditions relevant to the transportation at issue. *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 202 (1943). *See Household Goods Forwarders Ass'n v. American Export Lines*, 20 F.M.C. 496, 497 (1978) ("The existence of unjust discrimination is a factual question which depends upon more than a bare difference in rates on similar commodities. . . The decided cases reveal that a variety of rate discriminations are permissible in the presence

of justifying transportation conditions."), *aff'd Household Goods Forwarders Ass'n v. F.M.C.*, 627 F.2d 478 (D.C. Cir. 1980). Where conditions and circumstances are not substantially similar, differences in rates may be justified. *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 6–7 (1943). *See Port of Houston v. Lykes Bros. Steamship Co.*, 19 F.M.C. 192, 199 (1976) ("It has long been established that not all preferences or advantages offered by carriers are condemned by law, but only those that are undue or unreasonable violate the Shipping Act.") Here, any rate or liability differentiation that was based on a varied risk as to the ocean carrier's liability exposure in handling goods tendered by an NVOCC, versus the cargo owner, would not violate the antidiscrimination provisions. *See Plaquemines Port, Harbor and Terminal Dist. v. FMC*, 838 F.2d 536 (D.C. Cir. 1988); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968). Accordingly, there is no merit to the United States' contention that allowing shippers to pursue remedies available under state law would cause ocean carriers to violate antidiscrimination provisions of federal law.

CONCLUSION

Because ICC was not the agent of Kirby, Kirby was not bound by Hamburg Sud's bill of lading. Additionally, the Himalaya clause in ICC's bill of lading did not extend COGSA's liability limits to Norfolk Southern. Thus, the Eleventh Circuit's decision should be affirmed

Respectfully submitted,

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May 28, 2004

[redacted]

Consigned to the order of

ORDER

Blue Star (North America) Limited

Agents: P&O Containers Pty Limited
(A.C.N. 000 513 077) P&O CONTAINERS LTD
ARBN 074 877 562

Notify Party/Address

[redacted]

Place of Acceptance (Applicable only when this document is used as a Combined Transport Bill of Lading)

[redacted]

Vessel and Voyage No.

COL AUSTRALIA 124N

Port of Loading

BRISBANE

Place of Delivery (Applicable only when this document is used as a Combined Transport Bill of Lading)

PHILADELPHIA
USA

Port of Discharge

PHILADELPHIA

Container Nos. Marks and Nos.	Number and Kind of Packages; Description of Goods	Mass (kg)	Cube (cbm)
BSLY2711752	646 CARTONS	14419.8	0.000
Seal Number : DP1 035685			
PTI-9621	343 CTNS FRZN B/LESS BEEF		
PHIL	S-INS 14-18 LB		
	N 7699.0 / G 7939.1 KGS		
PTI-9621A	303 CTNS FRZN B/LESS BEEF		
PHIL	S-INS 14-18 LB		
	N 6720.8 / G 6932.9		
	REFRIGERATED CARGO		
	FREIGHT PREPAID		
	SERVICE CONTRACT NO: 96-20		
Approved establishment no(s) : 67,723			

Declaration of Value in accordance with paragraph 8(Bo)(iii)(3) over sale

* Total No. of

* Containers **********

Movement

FCL CUSTOMER /FCL FACILITY

Freight and Charges (Whether prepaid or collect)

AUST. HAUL/HANDOVER PREPAID
BSR ADDITIONALS PREPAID
BASIC/OCEAN FREIGHT PREPAID
POST SHIPMENT CHRGS COLLECT

Number of Original Bills of Lading

2 (two)

Shipped on board ocean vessel
COL AUSTRALIA at BRISBANE
on 17/12/96

Above Particulars as Declared by Shipper

Total Mass	Total Cube
14419.8	0.000

Accepted by the Carrier from the Shipper in apparent good order and condition (unless otherwise noted herein) the total number of containers or other packages or units indicated opposite * stated by the the Shipper to comprise the cargo specified above, for transportation subject to all the terms hereof (INCLUDING THE TERMS ON THE REVERSE HEREOF AND THE TERMS OF THE CARRIER'S APPLICABLE TARIFF) from the Place of Acceptance or the Port of Loading, whichever applicable, to the Port of Discharge or the Place of Delivery, whichever applicable. On presentation of this document duly endorsed to the Carrier, by or on behalf of the Holder, the rights and liabilities arising in accordance with the terms hereof shall (without prejudice to any rule of common law or statute rendering them binding upon the Shipper, Holder and Carrier) become binding in all respects between the Carrier and Holder as though the contract contained herein or evidenced hereby, had been made between them.
As far as this Bill of Lading covers COMBINED TRANSPORT, it is based on the uniform rules for a Combined Transport document ICC Brochure No. 298.

Place and Date of Issue:

BRISBANE 17/12/96

In Witness of the contract herein contained the number of originals stated opposite have been issued, one of which being accomplished the others to be void.

For Blue Star (North America) Limited as carrier

XXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXX COPY ONLY XXXXXXXX
XXXXX NOT NEGOTIABLE XXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXX

As Agents only

ESTAMENDED COPY

502500

APPENDIX 1a

CONDITIONS

1. DEFINITIONS

"Carrier" means Blue Star (North America) Limited on whose behalf this Bill of Lading has been signed.

"Merchant" includes the Shipper, Holder, Consignee, Receiver of the Goods, any person owning or entitled to the possession of the Goods or of this Bill of Lading and anyone acting on behalf of any such person.

"Holder" means any person for the time being in possession of this Bill of Lading to whom the property in the Goods has passed on or by reason of the consignment of the Goods or the endorsement of this Bill of Lading or otherwise.

"Goods" means the cargo accepted from the Shipper and includes any Container not supplied by or on behalf of the Carrier.

"Container" includes any container, trailer, transportable tank, flat or pallet or any similar article of transport used to consolidate goods.

"Carriage" means the whole of the operations and services undertaken by the Carrier in respect of the Goods.

"Combined Transport" applies when the Place of Acceptance and/or the Place of Delivery are indicated on the face hereof.

"Port to Port Shipment" applies where the Carriage called for by this Bill of Lading is not Combined Transport.

"Freight" includes all charges payable to the Carrier in accordance with the applicable Tariff.

2. CARRIER'S TARIFF

The terms of the Carrier's applicable Tariff are incorporated herein. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier or his agents upon request. In the case of inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.

3. WARRANTY

The Merchant warrants that in agreeing to the terms hereof he is, or has the authority of, the person owning or entitled to the possession of the Goods and this Bill of Lading.

4. SUB-CONTRACTING AND INDEMNITY

(1) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the Carriage.

(2) The Merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the Carriage or any part of the Carriage is performed or undertaken (other than the Carrier) which imposes or attempts to impose upon any such person or any vessel owned by any such person any liability whatsoever in connection with the Goods whether or not arising out of negligence on the part of such person and if any such claim or allegation should nevertheless be made to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for the benefit of such person and in entering into this contract, the Carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such persons.

5. CARRIER'S RESPONSIBILITY

(A) Port to Port Shipment

Where the Carriage called for by this Bill of Lading is a Port to Port Shipment, then

(1) the liability (if any) of the Carrier for loss of or damage to the Goods occurring from and during loading onto ship-going vessel up to and during discharge from that vessel or from whatever ship-going vessel onto which the Goods shall have been accompanied shall be determined in accordance with any convention law including the Hague Rules or The Hague-Visby Rules as amended by the Brussels Protocol of 23rd February, 1968 (hereinafter collectively referred to as the Hague Rules) or Shipowners and Bailors Act 1936 (Australia) or Bills of Lading Act 1936 (Australia) or Carriage of Goods by Sea Act 1924, the Canadian Water Carriage of Goods Act 1936, the Australian Carriage of Goods by Sea Act, 1991 and the New Zealand Sea Carriage of Goods Act 1979 or if there be no such ratified law, in accordance with the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 24th August, 1924. All the terms of this Bill of Lading (except (B) hereof) shall apply to such Carriage. Save that (i) any term in this Bill of Lading which is repugnant to the Hague Rules or the Hague Visby Rules (as the case may be) shall to that extent be void and inoperative and no further but not such void. Notwithstanding the above, the Carrier's liability, if any, shall be limited to loss of or damage to the Goods occurring from and during loading on to any ship-going vessel up to and during discharge from that vessel, and the carrier shall have no liability whatsoever for any loss or damage to the goods (whether it is actual or consequential) unless or such howsoever caused occurring before such loading or after such discharge. If necessary to the proper construction thereof the Carrier is hold liable for such loss or damage it shall nevertheless be entitled to the benefit of each limitation in section 4 (5) of U.S. Carriage of Goods by Sea Act, (1936) which shall be deemed to be incorporated herein.

(2) for the purpose of determining the extent of the Carrier's liability for loss of or damage to the Goods, the agreed value of the Goods is agreed to be the invoice value plus freight and insurance if paid.

(B) Combined Transport

Where the Carriage called for by this Bill of Lading is Combined Transport there, save as is otherwise provided in this Bill of Lading, the Carrier shall be liable for loss or damage occurring during Carriage to the extent and not below

(1) Where the stage of Carriage where loss or damage occurred is not known

(a) Subject to

Where the stage of Carriage where the loss or damage occurred is not known the Carrier shall be relieved of liability for any loss or damage if such loss or damage was caused by:

(i) an act or omission of the Merchant,

(ii) insufficiency of or defective condition of packing or marking,

(iii) handling, loading, stowage or unloading of the Goods by or on behalf of the Merchant,

(iv) inherent vice of the Goods,

(v) strike, lock-out, stoppage or restraint of labour the consequences of which the Carrier could not avoid by the exercise of reasonable diligence,

(vi) a matter beyond the the operation of a motive installation or a person acting for him in fable for any damage under an applicable international convention or national law governing liability in respect of nuclear energy,

(vii) any cause or event which the Carrier could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence.

(b) Burden of Proof

The burden of proving that the loss or damage was due to one or more of the causes or events specified in this sub-clause (B) (1) shall rest upon the Carrier. Save that, when the Carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in sub-paragraphs (b) (iii), (iv) or (vi) above, it shall be presumed that it was so caused. The Merchant shall, however, be entitled to prove that the loss or damage was not, in fact, caused either wholly or partly by one or more of these causes or events.

(c) Amount of Compensation

(i) Compensation shall be calculated by reference to the value of such Goods at the place and time when they are delivered to the Merchant or at the place and time when they should have been delivered.

(ii) The value of the Goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

Compensation shall in no circumstances whatsoever and howsoever arising exceed US$2.00 per kilo of the gross weight of the goods lost or damaged, unless it is proved that the loss or damage resulted from an act or omission of the Carrier done with the intent to cause damage or recklessly and with the knowledge that damage would probably result.

(2) Where the stage of Carriage where loss or damage occurred is known

Notwithstanding anything provided for in sub-clauses (B) (1) above and subject to Clause 14 (Both Cargo and Livestock), where it is known during which stage of Carriage the loss or damage occurred the liability of the Carrier in respect of such loss or damage shall be determined

(a) by the provisions contained in any international convention or national law, which provisions –

(i) cannot be departed from by private contract to the detriment of the Merchant, and

(ii) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of Carriage where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable;

Provided that an international convention or national law will determine the Carrier's liability as aforesaid only if it would have been applicable if the contract referred to in (ii) above were governed

(b) where the loss or damage occurred between the time that the Goods were consigned by the Carrier for Carriage and the time that the Goods were loaded at the port of loading, by the internal law of the state of the place of consignment, or

(c) where the loss or damage occurred during carriage by sea, by the internal law of the State of the final port of discharge, or

(d) where the loss or damage occurred between the time that the Goods were discharged at the final port of discharge and the time that the Goods were delivered to the Merchant, by the internal law of the State of the place of delivery, or

(e) where no international convention or national law would apply by virtue of (a) above, by the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 25th August, 1924, if the loss or damage is known to have occurred at sea or on inland waterways, or

(f) by the provisions of sub-clause (B) (1) in cases where the provisions of paragraphs (a) and (b) above do not apply.

Where under the provisions of this sub-clause (B) (2) the liability of the Carrier shall be determined by the provisions of any international convention or national law, the liability shall be determined as though the Carrier were the carrier referred to in any such convention or national law.

References in this sub-clause (B) (2) to the internal law of a State shall be construed to exclude all rules of private international law except that State's.

For the purposes of this sub-clause (B) (2) reference to the Hague Rules is hereby by was shall be deemed to include reference to carriage by inland waterways and the Hague Rules shall be considered accordingly.

(g) Notwithstanding the other provisions of clause 5(B) (2) where under this Bill of Lading either the place of acceptance or the place of delivery is an inland point in Canada or in the United States the responsibility of the Carrier with respect to the transportation inland in Canada or in the United States should be as follows:

(a) The Carrier shall procure transportation by carriers here or newly authorized by a competent authority to engage in transportation inland in Canada or in the United States. Such transportation should be subject to the inland Carriers contracts of carriage and tariffs. The Carrier guarantees the fulfilment of such inland carriers obligations under their contracts and tariffs.

(B) As to the services incident to transportation under (a) (A) the Carrier undertakes to procure such services as necessary. All such services will be subject to the usual conditions of persons providing the services. The Carrier guarantees fulfilment of the obligations of such persons under the contract concerned.

(3) Special Provisions for Combined Transport

(a) Notice of loss or damage

The Carrier shall be deemed prima facie to have delivered the Goods as described in this Bill of Lading unless notice of loss of, or damage to the Goods, indicating the general nature of such loss or damage, shall have been given in writing to the Carrier or to his representative at the place of delivery before or at the time of removal of the Goods into the custody of the person entitled to delivery thereof under this Bill of Lading, or if the loss or damage is not apparent, within seven consecutive days thereafter.

(b) Time-bar

Subject to any provision of this Clause 5 to the contrary the Carrier shall be discharged of all liability under this Bill of Lading unless suit is brought and notice thereof given to the Carrier within nine months after delivery of the Goods or the date when the Goods should have been delivered.

(C) General (applicable to both Port to Port Shipment and Combined Transport)

(1) Delay

The Carrier does not undertake that the Goods shall arrive at the port of discharge or place of delivery at any particular time or to meet any particular market or sale and save as provided in sub-clause (B) (2) above the Carrier shall in no circumstances be liable for direct, indirect or consequential loss or damage caused by delay.

Where under the provisions of (B) (2) above the Carrier is liable for delay, liability shall be limited to the amount of the freight applicable to the relevant stage of transport provided this is not contrary to the international convention or national law concerned.

(2) Deviation

The terms of this Bill of Lading shall govern the responsibility of the Carrier in connection with or arising out of the supply of a Container to the Merchant, whether supplied before or after the Goods are received by the Carrier for Carriage or delivered to the Merchant.

(3) Ad Valorem

Higher compensation may be claimed only when, with the consent of the Carrier the value of the Goods declared by the Shipper, which exceeds the limits laid down in this Clause, has been inserted in the box provided on the face of this Bill of Lading and extra freight paid. In that case the amount of the declared value shall be substituted for those limits. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

(4) Hague Rules Limitation

Subject to (3) above, whenever Hague Rules are applicable, otherwise than by national law, in determining the liability of the Carrier, the liability shall in no event exceed £ 100 sterling per package or unit.

(5) Scope of Application

Save as otherwise provided herein, the Carrier shall in no circumstances whatsoever or howsoever arising be liable for direct or indirect or consequential loss or damage. The defences and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier for loss or damage or delay whether the action be founded in Contract or in Tort.

6. SHIPPER-PACKED CONTAINERS

If a Container has not been stowed by or on behalf of the Carrier –

(a) the Carrier shall not be liable for loss of or damage to the Goods caused by

(i) the manner in which the Container has been stowed, or

(ii) the unsuitability of the Goods for carriage in Containers, or

(iii) the unsuitability or defective condition of the Container provided that where the Container has been provided by or on behalf of the Carrier this paragraph (iii) shall only apply if the unsuitability or defective condition would not have been apparent upon reasonable inspection by the Merchant at or prior to the time when the Container was stowed,

(b) the Merchant shall indemnify the Carrier against any loss, damage, liability or expense (otherwise and howsoever arising) and any one or more of the matters referred to in sub-paragraphs (a) (i), (ii) or (iii) above. Save that in the loss, damage, liability or expense was caused by a matter referred to in paragraph (a) (iii) the Merchant shall not be liable to indemnify the Carrier in respect thereof unless both the provisos referred to in that paragraph apply.

7. INSPECTION OF GOODS

The Carrier or any person to whom the Carrier has sub-contracted the Carriage or any person authorized by the Carrier shall be entitled, but under no obligation, to open any Container or package at any time and to inspect the Goods.

8. CARRIAGE AFFECTED BY CONDITION OF GOODS

If it appears at any time that the Goods or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring any additional expense or taking any measures in relation to the Container or the Goods or any part thereof, the Carrier may without notice to the Merchant take any measure(s) and/or incur any reasonable additional expense to carry or to continue the Carriage thereof, and/or abandon the Carriage and/or store the same ashore or afloat under cover or in the open, at any place, which abandonment or storage shall be deemed to constitute due delivery under this Bill of Lading. The Merchant shall indemnify the Carrier against any reasonable additional expense so incurred.

9. DESCRIPTION OF GOODS

(1) This Bill of Lading shall be prima facie evidence of the receipt by the Carrier in apparent good order and condition, except as otherwise noted, of the total number of Containers, packages or other units or weight of other cargoes specified on the face hereof. Proof to the contrary shall not be admissible when this Bill of Lading has been transferred to a third party acting in good faith.

(2) Except as provided in sub-clause 9 (1) above, no representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers or value of Goods and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars.

(3) If any particulars of any Letter of Credit and/or Import Licences and/or Sale Contract and/or Invoice or Order Number and/or details of any warrant to which the Carrier is not a party are inserted on the face of this Bill of Lading, such particulars are included solely at the request of the Merchant for the convenience of the Carrier. The Merchant agrees that the inclusion of such particulars shall not be regarded as a declaration of value and in no way affects the Carrier's liability under this Bill of Lading. The Merchant further agrees to indemnify the Carrier against all consequences of including such particulars in this Bill of Lading.

The Merchant acknowledges that, except when the provisions of sub-clause 9 (c) (3) apply, the value of the Goods is unknown to the Carrier.

10. SHIPPER'S RESPONSIBILITY

(1) The Shipper warrants to the Carrier that the particulars relating to the Goods as set out inserted have been checked by the Shipper on receipt of this Bill of Lading and that such particulars and any other particulars furnished by or on behalf of the Shipper are correct.

(2) The Shipper shall indemnify the Carrier against all loss, damage, fines and expenses arising or resulting from inaccuracies in or inadequacy of such particulars or from any other cause in connection with the Goods for which the Carrier is not responsible.

11. FREIGHT AND CHARGES

(1) Freight shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event.

(2) The Merchant's attention is drawn to the stipulations concerning currency in which the Freight is to be paid, rate of exchange, devaluation and other contingencies relative to Freight in the applicable Tariff.

(3) The Freight has been calculated on the basis of particulars furnished by or on behalf of the Shipper. The Carrier may at any time upon any Container or other package or unit in order to exercise, amendment or revision the contents, and if the particulars furnished by or on behalf of the Shipper are incorrect, it is agreed that a sum equal to either five times the difference between the correct Freight and the Freight charged or to double the correct Freight less the Freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Carrier.

(4) Except as may be prescribed to the contrary in the applicable Tariff all unpaid charges shall be paid without any set-off, counterclaim or deduction of any description.

(5) Freight and liquidated damages under sub-clauses 11 (3) above may be recovered by the Carrier from any person falling within the definition of Merchant in Clause 1 whether or not such person is the Shipper.

12. LIEN

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and any other contract for general average contribution, and for the costs of recovering the same, and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant. The Merchant shall indemnify the carrier against all and any extra costs incurred for any reason whatsoever.

13. OPTIONAL STOWAGE

(1) The Goods may be stowed in pump, forecastle, deck house, shelter deck, passenger spaces, lumber spaces or any enclosed or open commonly used in the trade for the carriage of goods.

(2) The Goods may be stowed by the Carrier in Containers.

(3) Goods stowed in Containers whether by the Carrier or the Merchant may be carried on deck or under deck without notice to the Merchant. Such Goods (other than livestock) whether carried on deck or under deck shall participate in general average and shall be delivered as fire within the definition of Goods in the Hague Rules or Hague Visby Rules or where the Hague Visby Rules would be applicable to the Carriage under the provisions of Clause 5 (Carrier's Responsibility) hereof, for the purposes of the Hague Visby Rules).

14. DECK CARGO AND LIVESTOCK

(1) Goods (not being Goods stowed in Containers) which are stated herein to be carried on deck and livestock, whether or not carried on deck, are carried without responsibility on the part of the Carrier for loss or damage of whatsoever nature arising during Carriage by any whether caused by unseaworthiness or negligence or any other cause whatsoever.

(2) Livestock are carried at the sole risk of the Merchant. The Carrier shall be under no liability whatsoever for any injury, illness, death, delay or deterioration howsoever arising even though caused or contributed to by the act, neglect or default of the Carrier or by the unseaworthiness or unfitness of any vessel, craft, conveyance, Container or other place utilizing at any time in the event of the Master, in his sole discretion, considering that any livestock is likely to be injurious to the health of any other livestock or of any person on board or to cause loss except to be released or interested in the prosecution of the voyage such livestock may be destroyed and thrown overboard without any liability attaching to the Carrier. The Merchant shall indemnify the Carrier against all and any extra costs incurred for any reason whatsoever in connection with the carriage of such livestock.

15. METHODS AND ROUTE OF TRANSPORTATION

(1) The Carrier may at any time and without notice to the Merchant:–

(a) use any means of transport or storage whatsoever;

(b) transfer the Goods from one conveyance to another including transhipping or carrying the same on another vessel than that named on the face hereof or by any other means of transport whatsoever;

(c) unstack and remove Goods (which have been stowed into a Container and forward the same in a Container or otherwise;

(d) proceed by any route in his discretion (whether or not the nearest or most direct or customary or advertised route) and proceed to or stay at any place or port whatsoever once or more often and in any order;

(e) load or unload the Goods at any place or port (whether or not any such port is named overleaf as the Port of Loading or Port of Discharge) and store the Goods at any such place or port;

(f) comply with any orders or recommendations given by any government or authority or any person or body acting or purporting to act on or on behalf of such government or authority or having under the terms of the insurance on the conveyance employed by the Carrier the right to give orders or directions;

(g) carry the Goods on deck or under deck.

(2) The liberties set out in sub-clause (1) may be invoked by the Carrier for any purpose whatsoever whether or not connected with the Carriage of the Goods including undergoing repairs, towing or being towed, adjusting instruments, dry docking and assisting vessels in all situations. Anything done in accordance with sub-clause (1) or any delay arising therefrom shall be deemed to be within the contractual carriage and shall not be a deviation.

(3) By tendering Goods for Carriage without any written request for Carriage in a specialized Container or for Carriage otherwise than in a Container the Merchant accepts that the Carriage may properly be undertaken in a general purposes Container.

16. MATTERS AFFECTING PERFORMANCE

If at any time the Carriage is or is likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind (other than the inability of the Goods or any part thereof safely or properly to be carried or carried further) and howsoever arising (even though the circumstances giving rise to such hindrance, risk, delay, difficulty or disadvantage existed when this contract was entered into or the Goods were accepted for Carriage) and which cannot be avoided by the exercise of reasonable endeavours the Carrier (whether or not the Carriage is commenced) may either –

(a) Without notice to the Merchant abandon the Carriage of the Goods and place the Goods or any part of them at the Merchant's disposal at any place or port which the Carrier may deem safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on Goods received for Carriage, and the Merchant shall pay any additional costs of Carriage to and delivery and storage at such place or port, or

(b) without prejudice to the Carrier's right subsequently to abandon the Carriage under (a), upon notice to the Merchant suspend Carriage of the Goods or any part of them and store them ashore or afloat upon the terms of this Bill of Lading, against payment of such reasonable additional charges as the Carrier may determine. The Carrier undertakes to take such steps as to forward Goods, the Carriage of which has been suspended, as soon as possible after the cause of hindrance, risk, delay, difficulty or disadvantage has been removed but makes no representations as to the maximum period between such removal and the forwarding of the Goods to the Place of Delivery named in the Bill of Lading.

17. DANGEROUS GOODS

(1) No goods which are or may become dangerous, inflammable or damaging (including radio-active materials), or which are or may become liable to damage any property whatsoever, shall be tendered to the Carrier for Carriage without the express consent in writing and without the Container or other covering in which the goods are to be transported and the goods being distinctly marked on the outside so as to indicate the nature and character of any such articles and so as to comply with any applicable laws, regulations or orders in force. If any such articles are delivered to the Carrier without such consent and marking or if in the opinion of the Carrier the articles are or are liable to become of a dangerous, inflammable or damaging nature they may at any time be destroyed, disposed of, abandoned, or rendered harmless without compensation to the Merchant and without prejudice to the Carrier's right to Freight.

(2) The Merchant undertakes that the Goods are packed in a manner adequate to withstand the ordinary risks of Carriage having regard to their nature and in compliance with all laws or regulations which may be applicable during Carriage.

(3) Whether or not the Merchant was aware of the nature of the goods the Merchant shall indemnify the Carrier against all claims, losses, damages or expenses arising in consequence of any breach of the provisions of this Clause.

(4) Nothing contained in this Clause shall deprive the Carrier of any of his rights otherwise provided for.

18. REGULATIONS RELATING TO GOODS

The Merchant shall comply with all regulations or requirements of customs, port and other authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses or losses incurred or suffered by reason thereof or by reason of any illegal, incorrect or insufficient marking, numbering or addressing of the Goods, and shall indemnify the Carrier in respect thereof.

19. NOTIFICATION AND RELEASE

(1) Any mention herein of parties to be notified of the arrival of the Goods is solely for information of the Carrier, and failure to give such notification shall not involve the Carrier in any liability nor relieve the Merchant of any obligation hereunder.

(2) Where the Carriage called for by this Bill of Lading is a Port to Port Shipment the Carrier shall be at liberty to discharge the Goods or any part thereof without notice whereby they come in hand at or on to any wharf, craft or place on any day and at any time, whereupon the liability of the Carrier (if any) in respect of the Goods or that part thereof discharged as aforesaid shall wholly cease notwithstanding any statement to the contrary and notwithstanding that any charges, dues or other expenses may be or become payable. If such are used, other than at the request of the Merchant, in circumstances where the Goods or that part thereof are discharged could have been discharged ashore without additional delay, the Goods or that part thereof, as the case may be, shall nevertheless still be deemed to be discharged for the purposes of this Clause and of Clause 5 until they are discharged from such craft. The Merchant shall upon delivery of the Goods, upon discharge. All expenses incurred by reason of the Merchant's failure to take delivery of the Goods as aforesaid shall be for the Merchant's account.

(3) Where the Carriage called for by this Bill of Lading is Combined Transport, the Merchant shall take delivery of the Goods within the time provided for in the Carrier's applicable Tariff (see Clause5).

(4) If delivery of the Goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, whether the carriage called for by this Bill of Lading is a Port to Port Shipment or Combined Transport, the Carrier shall be entitled without notice to endorse the Goods or that part thereof if stowed in Containers and/or to store the Goods or that part thereof ashore, afloat, in the open or under cover at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon all liability of the Carrier in respect of the Goods or that part thereof stored as aforesaid shall cease and the Merchant shall forthwith pay the Carrier on demand all charges payable and all expenses incurred by the Carrier or any agent or sub-contractor of the Carrier's shall forthwith upon demand be paid by the Merchant to the Carrier.

(5) If the Merchant fails to take delivery of the Goods within thirty days of its becoming due under sub-clauses (2) or (3) above or if in the opinion of the Carrier they are likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of their value, and whether the Carriage is a Port to Port Shipment or Combined Transport, the Carrier may, without prejudice to any other rights which he may have against the Merchant, without notice and without any responsibility whatsoever attaching to him, sell or dispose of the Goods and apply the proceeds of sale in reduction of the sums due to the Carrier from the Merchant in respect of this Bill of Lading.

20. BOTH-TO-BLAME COLLISION

If the carrying ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default in the navigation of the management of the carrying ship, the Merchant undertakes to pay the Carrier, or where the Carrier is not the owner of or entitled to the possession of the carrying ship, to pay to the Carrier as trustee for the owner and/or demise charterer of the carrying ship, such sum as the Merchant is indemnify the Carrier and/or the owner and/or demise charterer of the carrying ship against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of or damage to, any claim whatsoever of the Merchant, paid or payable by the other or non-carrying ship or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or her owner or demise charterer or the Carrier. The foregoing provisions shall also apply where the owners, operators, or those in charge of any ship or ships or objects, other than, or in addition to the colliding ships or objects, are at fault in respect to a collision, contact, stranding or other accident.

21. GENERAL AVERAGE

General average shall be adjusted according to the York Antwerp Rules, 1974, as amended 1990, at any port or place at the option of the Carrier whether declared by the Carrier or a sub-contractor of the Carrier. The Merchant shall give such cash deposit or other security as the Carrier may deem sufficient to cover the estimated general average contribution of the Goods and any salvage and special charges thereon, before delivery of the Goods. Delivery of the Goods whether or not at the time of delivery the Merchant had notice of the Carrier's lien. The Carrier shall be under no obligation to exercise any lien for general average contribution due to the Merchant.

In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever whether due to negligence or not, for which or for the consequence of which, the carrier is not responsible by statute, contract or otherwise, the goods shippers, consignees or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.

If a adjusting consent is owned or operated by the Carrier, salvage shall be paid for as fully as if said salvage was owned or operated by strangers.

Such deposit as the Carrier may require will be paid to cover the estimated contribution of the goods and any salvage or special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the Carriers before delivery.

22. VARIATION OF THE CONTRACT, ETC.

No servant or agent of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorised or ratified in writing by the Carrier.

23. LAW AND JURISDICTION

Disputes arising under this Bill of Lading shall be determined at the option of the Merchant either by the U.S. District Court for the Southern District of New York in accordance with the laws of the U.S.A. or by Canadian Courts in accordance with the laws of Canada or by Courts of Australia in accordance with Australian law or by the Courts of New Zealand in accordance with the laws of New Zealand. If anything in this Bill of Lading is inconsistent with or repugnant to the laws stipulated in this Bill of Lading it shall only be null and void to the extent of such inconsistency or repugnance.